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# Legalese to the Detriment of Small Business: Midwest Family Mutual Insurance Co. v. Wolters

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**LEGALESE TO THE DETRIMENT OF SMALL BUSINESS:  
MIDWEST FAMILY MUTUAL INSURANCE CO. V. WOLTERS**

Andy Hofer<sup>†</sup>

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I. INTRODUCTION

In the 1970s, insurance companies nationwide began to incorporate what came to be known as “pollution exclusions” in commercial general liability policies.<sup>1</sup> The exclusions served a distinct and reasonable purpose—to protect against insurer liability for the costs of mitigating excessive environmental damage caused

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1. Claudia G. Catalano, Annotation, *What Constitutes “Pollutant,” “Contaminant,” “Irritant,” or “Waste” Within Meaning of Absolute or Total Pollution Exclusion in Liability Insurance Policy*, 98 A.L.R. 5th 193, § 2 (2002).

by the insured.<sup>2</sup> Over time, the exclusions were modified by court interpretation and the evermore expansive language in the policies themselves,<sup>3</sup> a process that continues today.

In *Midwest Family Mutual Insurance Co. v. Wolters*,<sup>4</sup> the Minnesota Supreme Court considered the scope of an absolute pollution exclusion in a commercial general liability policy.<sup>5</sup> The court held that the exclusion barred coverage for damage caused by carbon monoxide poisoning resulting from the improper installation of a furnace.<sup>6</sup> This holding raises a number of issues.

First, while acknowledging that pollution exclusions have been subject to a great deal of litigation in the past, the court held that there was no ambiguity in the *Wolters* pollution exclusion.<sup>7</sup> This finding is counterintuitive and will result in even more litigation. As will be demonstrated through both case law and a hypothetical—but real-world—example, the status of absolute pollution exclusions under current Minnesota law effectively gives insurers an incentive to litigate against their own clients.<sup>8</sup>

Second, the court's holding results in an undue expansion of the absolute pollution exclusion.<sup>9</sup> This is problematic on a number of levels, not the least of which is that those insured under such policies often create the very foundations upon which our economies and homes are built. This Note will demonstrate that this expansion may harm those companies that have taken the responsible action of securing liability insurance.<sup>10</sup> In some instances, the risks of having the insurance may be greater than avoiding it altogether.<sup>11</sup>

Finally, the court ignored the standard of the reasonable insured.<sup>12</sup> This exacerbates the disparities of bargaining power

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2. John V. Garaffa & Michael W. Goodin, *The Absolute Pollution Exclusion: Pollution and Fungus, Wet Rot, Dry Rot, and Bacteria*, 50 TORT TRIAL & INS. PRAC. L.J. 105, 105–06 (2014).

3. See Thomas K. Bick & Lisa G. Youngblood, *The Pollution Exclusion Saga Continues: Does It Apply to Indoor Releases?*, 5 S.C. ENVTL. L.J. 119, 124 (1997).

4. 831 N.W.2d 628 (Minn. 2013).

5. *Id.*

6. *Id.* at 636–37.

7. *Id.* at 637.

8. See *infra* Part IV.

9. See *infra* Part IV.B.

10. See *infra* Part IV.B.

11. See *infra* Part IV.B.

12. See *Wolters*, 831 N.W.2d at 634–39.

inherent in insurance policies.<sup>13</sup> Insurers write the policies; insurers price the policies; insurers sell the policies. Now the insurers get to interpret the policies as well, without regard for what the purchasers reasonably expect the policies to cover.<sup>14</sup> This is in ironic contrast to the court's supposed "non-technical, plain-meaning" interpretation, as the court has now held that insurers are more equipped to determine definitions based on common language than the insured.<sup>15</sup>

This Note examines each of the preceding issues and concludes that the Minnesota Supreme Court erred in not adopting the majority interpretation of absolute pollution exclusions.<sup>16</sup> This Note will demonstrate that, despite several decades of rewriting and reinterpretation,<sup>17</sup> most courts still hold pollution exclusions to bar coverage only for harm caused by "traditional environmental pollutants."<sup>18</sup>

This Note further suggests that a new way to interpret absolute pollution exclusions was available to the court;<sup>19</sup> Judge Richard Posner of the Seventh Circuit Court of Appeals had proposed this new interpretation more than a year before the court decided *Wolters*.<sup>20</sup> While such a change may disappoint insurers, it would be

13. A central tenet of contract law is that the party that maintains the dominant position in negotiating the contract must be required, in the event of a dispute, to bow to the reasonable understanding of the more submissive party. *See id.* at 636.

14. As the court alluded to, it is easy to confuse the standard of the reasonable insured with the reasonable expectations doctrine. *See id.* at 634. The former is explained *infra* Part II.B of this Note, whereas the reasonable expectations doctrine is primarily concerned with whether the exclusion is "hidden" within the contract by some means. *Id.*

15. *Id.* at 637; *see infra* Part IV.C.

16. *See infra* Part V.

17. *See generally* 22 BRITTON D. WEIMER ET AL., MINNESOTA PRACTICE: INSURANCE LAW AND PRACTICE § 12:21 (2d ed. 2010) (broadly describing the evolution of pollution exclusions in Minnesota).

18. *See Bick & Youngblood, supra* note 3, at 121. Although "traditional environmental pollutants" can be defined in a number of ways, they are generally limited to substances which cause significant and long-lasting damage to the environment when released. *See, e.g.,* *Scottsdale Indem. Co. v. Vill. of Crestwood*, 673 F.3d 715, 717 (7th Cir. 2012); *Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co.*, 976 F.2d 1037, 1043–44 (7th Cir. 1992); *Westchester Fire Ins. Co. v. City of Pittsburg, Kan.*, 768 F. Supp. 1463, 1470 (D. Kan. 1991), *aff'd sub nom. Pa. Nat'l Mut. Cas. Ins. Co. v. City of Pittsburg, Kan.*, 987 F.2d 1516 (10th Cir. 1993).

19. *See infra* Part IV.C.

20. *See Crestwood*, 673 F.3d at 717.

fairer to those who purchase the policies and would benefit society at large. In the interest of Minnesota businesses, in devotion to age-old rules of interpretation, and in the name of common sense, the Minnesota Supreme Court must revisit this topic at its first opportunity.

## II. HISTORY OF THE LAW

### A. *The Development of Pollution Exclusions*

Pollution exclusions began to appear in general liability insurance policies during the 1970s,<sup>21</sup> and the earliest versions were known as “qualified” pollution exclusions.<sup>22</sup> In the 1980s, the exclusions were significantly broadened;<sup>23</sup> these new clauses, such as that at issue in *Wolters*,<sup>24</sup> were often termed “absolute” pollution exclusions.<sup>25</sup>

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21. E. Joshua Rosenkranz, Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L.J. 1237, 1239–40 (1986).

22. Jeffrey W. Stempel, *Reason and Pollution: Correctly Construing the “Absolute” Exclusion in Context and in Accord with Its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1, 14 (1998). The earliest pollution exclusions were considered to be “qualified” because they did cover pollutant-related damages when incurred suddenly, accidentally, or unexpectedly. *Id.* at 1 n.1. Bick and Youngblood also state that:

The standard form sudden and accidental pollution exclusion states: This insurance does not apply . . . to Bodily Injury or Property Damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Bick & Youngblood, *supra* note 3, at 123 (quoting BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* § 10.02(e) (1995)).

23. See Bick & Youngblood, *supra* note 3, at 124 (“After extensive litigation over the scope of the sudden and accidental pollution exclusion, the [Insurance Service Office] introduced a new version of the exclusion, the absolute pollution exclusion. This exclusion, or a variation on it, is found in most policies issued after 1986.”); Stempel, *supra* note 22, at 2–3.

24. See *Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 631–32 (Minn. 2013).

25. See Bick & Youngblood, *supra* note 3, at 124. The revised clauses did not provide coverage for pollutant-related damages even when such damages occurred under conditions for which coverage would have been restored under the earlier “qualified” pollution exclusions. See *id.* at 120. The absolute pollution exclusions

Absolute pollution exclusions have prompted a great deal of litigation over the course of the past three decades.<sup>26</sup> Generally, the cases revolve around whether or not the exclusions, or particular terms within the exclusions, are ambiguous.<sup>27</sup> The clauses themselves differ to a minimal extent,<sup>28</sup> but a jurisdictional split as to the presence of ambiguity in the term “pollutant” has arisen.<sup>29</sup>

The primary reason that insurers progressed from qualified exclusions to absolute exclusions is of particular importance: they reasonably sought to protect themselves from the extensive costs of environmental litigation and large-scale environmental cleanup projects.<sup>30</sup>

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generally come in one of two forms:

The primary standard form absolute pollution exclusion states:

This insurance does not apply to

(f)(1) Bodily Injury or Property Damage arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants at or from premises you own, rent or occupy.

“Pollutants” is typically defined as:

any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Counsel should be aware, however, that a second, less prevalent, but nonetheless standard [Insurance Service Office]-issued exclusion is worded slightly, but critically, differently. This second exclusion reads as follows:

“This insurance does not apply:

(1) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste material or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, whether or not such discharge, dispersal, release or escape is sudden or accidental.”

*Id.* at 124–25 (quoting OSTRAGER & NEWMAN, *supra* note 22).

26. *Id.* at 120.

27. *See, e.g.,* Scottsdale Indem. Co. v. Vill. of Crestwood, 673 F.3d 715, 717 (7th Cir. 2012) (discussing the literal reading of the policy language).

28. Bick & Youngblood, *supra* note 3, at 123–25.

29. *See id.* at 131–32 (discussing how different courts have treated the definition of “pollution”).

30. *See Crestwood*, 673 F.3d at 718 (“[I]t was the passage in 1980 of CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 *et seq.*), the federal toxic-waste statute, and the threat and later the reality of government-ordered cleanup costs imposed by CERCLA, that prompted the industry to adopt the current, broader exclusion.” (citing *MacKinnon v. Truck*

### B. *The Basics of the Rules*

A slim majority of jurisdictions hold that absolute pollution exclusions only apply to traditional environmental pollution, and thus enforce coverage where the contaminant is released indoors.<sup>31</sup> This interpretation pays heed to the very reason that commercial general liability policies are often purchased: to protect against negligent actions. Such actions may well include avoidable mistakes, like the error at issue in *Wolters*,<sup>32</sup> but the human tendency to err is precisely what liability insurance is for.

The minority rule is to interpret the exclusions broadly so as to include substances that virtually no layperson would ever construe as a “pollutant.”<sup>33</sup> Indeed, even some of the foremost legal thinkers of our time have difficulty seeing how the minority justifies its expansive definition of “pollutant.”<sup>34</sup> The minority rule also broadens the exclusions to bar coverage for the release of numerous substances indoors—whether the substance is a traditional environmental pollutant or not.<sup>35</sup> As the facts of *Wolters* demonstrate,<sup>36</sup> such a broad interpretation undermines the very reason for liability policies in the first place.

One of the more notable aspects of the jurisdictional split is that courts of both persuasions have often reached their contradictory conclusions while applying substantially similar rules of contract interpretation.<sup>37</sup> A few of these rules are as follows: words are defined according to their most common usage;<sup>38</sup> an

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Ins. Exch., 73 P.3d 1205, 1210–11 (Cal. 2003); *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119, 126 (La. 2000); *Kent Farms, Inc. v. Zurich Ins. Co.*, 998 P.2d 292, 295 (Wash. 2000)).

31. 22 WEIMER ET AL., *supra* note 17.

32. *Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 630–31 (Minn. 2013).

33. See generally *infra* Part IV.B–C (hypothesizing that even water may be considered a “pollutant” under the minority interpretation).

34. See *infra* Part IV.C.

35. 22 WEIMER ET AL., *supra* note 17.

36. See 831 N.W.2d at 631–32; *infra* Part III.A.

37. Compare *Scottsdale Indem. Co. v. Vill. of Crestwood*, 673 F.3d 715, 717 (7th Cir. 2012) (applying the majority rule and holding that the claims against the village fell within the scope of the pollution exclusion clause at issue), with *Wolters*, 831 N.W.2d at 642–43 (applying the minority rule and holding that carbon monoxide released indoors constituted a pollutant within the meaning of the policy’s exclusion clause); see also Stempel, *supra* note 22, at 7.

38. See, e.g., *American States Ins. Co. v. Koloms*, 687 N.E.2d 72, 75 (Ill. 1997)

ambiguity is present anywhere that two or more reasonable interpretations exist;<sup>39</sup> any ambiguities are to be construed in favor of the insured;<sup>40</sup> and coverage should be found where a reasonable insured would expect to be covered.<sup>41</sup>

The last rule is, in essence, a rule based on common sense. A contract is a mutual agreement between two or more parties.<sup>42</sup> Where an insurer and an insured disagree upon the applicability of an exclusion, or on any other portion of the contract, there is a gap.<sup>43</sup> Employing the first two rules, it must then be found that there is an ambiguity, and that ambiguity must be resolved in favor of the insured.<sup>44</sup>

The importance of construing insurance contracts according to what a reasonable insured would expect them to mean is clear to any casual observer. Insurers write the contracts; they often do so with their own team of attorneys or by following the lead of the Insurance Service Office.<sup>45</sup> The insured, on the other hand, very rarely has such resources at her disposal.<sup>46</sup> She must read the contract as a layperson, and it is patently unreasonable to expect that any insured reach the same conclusions as professionals who spend their careers entertaining the broad potential of seemingly everyday language.

The court purported to apply the standard rules of contract interpretation in deciding *Wolters*.<sup>47</sup> This was not really the case; it reached a result that is contrary to a true application of the rules,<sup>48</sup> and it entirely disregarded the standard of the reasonable insured.<sup>49</sup>

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(applying the majority rule); *Wolters*, 831 N.W. 2d at 636 (applying the minority rule).

39. See cases cited *supra* note 38.

40. See cases cited *supra* note 38.

41. See cases cited *supra* note 38.

42. RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981).

43. See *id.*

44. See cases cited *supra* note 38.

45. Bick & Youngblood, *supra* note 3, at 123.

46. As illustrated by the great deal of litigation that has arisen from absolute pollution exclusions, it is clear that the insured often expect coverage following certain incidents. See *infra* Part IV. Despite this apparent lack of mutual agreement, insurers continue to bring lawsuits to advance the majority interpretation. See *infra* Part II.D; see also Catalano, *supra* note 1.

47. 831 N.W.2d 628, 636–37 (Minn. 2013).

48. See *infra* Part IV.

49. See *infra* Part IV.D.



### C. *Minority Rule: A Broad Interpretation*

In Minnesota, the courts have been considering the meaning of “pollutant” within the context of absolute pollution exclusions for nearly three decades.<sup>50</sup> In *League of Minnesota Insurance Trust v. City of Coon Rapids*, the Minnesota Court of Appeals held that an absolute pollution exclusion precluded coverage for injuries caused by the release of carbon dioxide inside an ice arena.<sup>51</sup> This holding, as the minority rule so often does, took the insured by surprise and solely benefitted the insurer.<sup>52</sup>

*League of Minnesota Insurance Trust* also abandoned the notion that absolute pollution exclusions should only be applied to

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50. *E.g.*, *Grinnell Mut. Reinsurance Co. v. Wasmuth*, 432 N.W.2d 495, 497–500 (Minn. Ct. App. 1988), *overruled by* *Bd. of Regents v. Royal Ins. Co. of Am.*, 517 N.W.2d 888 (Minn. 1994).

51. 446 N.W.2d 419, 422 (Minn. Ct. App. 1989). In pertinent part, the pollution exclusion stated:

This policy does not apply to:

(1) “Bodily Injury” or “Property Damage” arising out of the actual alleged or threatened discharge, dispersal, release or escape of pollutants:

(a) at or from premises you own, rent or occupy;

. . . .

(d) at or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

(i) to test for, monitor, clean up, removal, contain, treat, detoxify or neutralize the pollutants, or

(ii) if the pollutants are brought on or to the site or location by or for you.

(2) Any loss, cost or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including asbestos, smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste materials. Waste material includes material which are intended to be or have been recycled, reconditioned, or reclaimed.

*Id.* at 420.

52. *See id.* The contract language at issue in *League of Minnesota* was broad enough that nearly any substance could be considered a “pollutant,” and the insured was almost certainly surprised to learn that it excluded coverage for harm caused while performing routine ice maintenance at an arena. *See supra* text accompanying note 51.

traditional environmental pollutants.<sup>53</sup> In contrast to substances like carbon monoxide and carbon dioxide, traditional environmental pollutants require an extended period of time to cause substantial harms.<sup>54</sup> Perhaps more significantly, mitigating those harms requires expansive efforts, large expenditures, and substantially more time than it takes to air out an arena.<sup>55</sup>

In *Board of Regents v. Royal Insurance Co. of America*, the Minnesota Supreme Court decided the same asbestos case under two different pollution exclusions and came to two different conclusions.<sup>56</sup> While such a result does, without more detail, seem to make sense, it once again provided a benefit to the insurer while defeating another essential purpose of insurance: protection against unexpected harm caused by substances previously thought to be beneficial.

*Board of Regents* also reiterated the court's earlier abandonment of the reasonable expectations doctrine under certain conditions.<sup>57</sup> Essentially, the court held that the doctrine is only applicable where an exclusion is not clearly identified as such in the contract.<sup>58</sup> This holding was flawed in that these cases do not

53. See *League of Minn.*, 446 N.W.2d at 421–22.

54. See *infra* Part IV.B.

55. See *League of Minn.*, 446 N.W.2d at 421.

56. 517 N.W.2d 888, 890–94 (Minn. 1994). Over a period of years, the University of Minnesota had fireproofing materials containing asbestos installed in some of its buildings. *Id.* at 889. Over the subsequent two decades, the materials contaminated the indoor air, and the Board of Regents then sued multiple parties for the cost of removing the asbestos. *Id.* The first policy contained a qualified pollution exclusion that barred coverage for pollutant-caused damage “into or upon land, the atmosphere, or any watercourse or body of water” but restored coverage where the pollutant “discharge, dispersal, release or escape is sudden and accidental.” *Id.* at 890. The second policy contained a pollution exclusion that barred coverage for pollutant-caused damage “of land, water, air, or real or personal property” and did not contain the exclusion exemption found in the first policy. *Id.* at 893–94. The first policy, which restored coverage in the event of “sudden and accidental” damage caused by pollutants, was found to cover the removal cost of asbestos. *Id.* at 891–92. The second policy, which did not restore coverage in the event of an abrupt accident and used the word “air” instead of “atmosphere,” was found to not cover the removal cost of asbestos. *Id.* at 893–94.

57. *Id.* at 891.

58. *Id.* (“In the comprehensive general liability policy involved in this case, the pollution exclusion is plainly designated as such; consequently, the wording of the exclusion should be construed, if a claim of ambiguity is raised, in accordance with the usual rules of interpretation governing insurance contracts. The reasonable expectation test is not a license to ignore the pollution exclusion in

revolve around such a simple question as whether the exclusion is labeled or not.<sup>59</sup> Rather, they revolve around the definition and applicability of the words within the exclusion.<sup>60</sup>

The deciding question in such litigation should not be whether the insured was able to find the exclusion within the policy; it should be whether the insured could have reasonably expected the exclusion to bar coverage under the particular facts of the case.<sup>61</sup> Contrary to the question asked in *Board of Regents* and subsequent cases,<sup>62</sup> this question accounts for at least two of the other basic tenets of contract interpretation as well—that words in the contract are to be defined according to their plain and ordinary meaning, and any ambiguity is to be strictly construed against the authoring party.<sup>63</sup>

In *Auto-Owners Insurance Co. v. Hanson*,<sup>64</sup> the pollution exclusion in a landlord's commercial liability policy was found to bar coverage for harm done to a child by the ingestion of lead paint.<sup>65</sup> Once again, the insurance industry's affinity for stretching language resulted in cost savings for one party and uncompensated

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this case nor to rewrite the exclusion solely to conform to a result that the insured might prefer.”).

59. See generally Bick & Youngblood, *supra* note 3 (examining the questions upon which cases involving absolute pollution exclusions rest).

60. See *id.*

61. See *infra* Part IV.D.

62. 517 N.W.2d 888, 891 (Minn. 1994) (determining that the reasonable expectations doctrine is defeated when pollution exclusions are demarcated as such).

63. See cases cited *supra* note 38.

64. 588 N.W.2d 777 (Minn. Ct. App. 1999).

65. *Id.* at 782. The policy used the word “atmosphere” as one of the locations for which pollutant release was not covered, and it did not restore coverage in the event of an accident. *Id.* at 778 n.1. More fully, the exclusion barred coverage for the “discharge, release, escape, seepage, migration or dispersal of pollutants at or from any premises owned by an insured. The policy defined pollutant as any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gases and waste.” *Id.* at 778 (internal quotation marks omitted). Given the circumstances of the case, which—although accorded limited space in the court’s opinion—almost certainly involved the toddler eating paint chips, it is difficult to see how a reasonable insured would consider the actions of a child, no doubt predictable through actuary science, to constitute “dispersal of pollutants.” *Id.*; see also *infra* Part IV.B (describing yet another example, albeit hypothetical, that may very well now be barred coverage despite common sense dictating a contrary conclusion).

harm to the other.<sup>66</sup> This is not what any court intends when it becomes mired in contract interpretation, but it is a consequence of common sense being removed from complex legal doctrine.

As the next section demonstrates, the current trajectory of the Minnesota courts is not the only option.<sup>67</sup> Other courts have interpreted absolute pollution exclusions concurrently with Minnesota, and most have applied the exclusions much more narrowly than Minnesota has.

#### *D. Majority Rule: A Narrow Interpretation*

The majority of courts in the United States require that pollution exclusions remain faithful to the insurers' original intent and, more importantly, to the reasonable expectations of those who purchase the policies.<sup>68</sup> The case law incorporating this approach is voluminous and comes from every region of the country,<sup>69</sup> but the Seventh Circuit Court of Appeals provides particularly well-stated examples.

In a departure from the normal circumstances in which an insurer engages in litigation against its own insured, *West Bend Mutual Insurance Co. v. U.S. Fidelity & Guaranty Co.*<sup>70</sup> involved litigation between different insurers.<sup>71</sup> West Bend filed an action against Federated Mutual Insurance Company (as well as Fidelity and another insurer) for refusing to defend and indemnify a mutual insured against claims resulting from leakage of a commercial gasoline tank into a surrounding residential area.<sup>72</sup>

In this case, the insured knew of the pollution for several years.<sup>73</sup> During that time, the insured maintained commercial

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66. See *Hanson*, 588 N.W.2d at 778.

67. See *infra* Part II.D (noting that Judge Posner of the Seventh Circuit Court of Appeals had proposed a new, and eminently reasonable, standard for application of absolute pollution exclusions given both the changes in policy language over time and the standard of the reasonable insured).

68. See Bick & Youngblood, *supra* note 3, at 133–36 (noting that, in multiple instances, courts found that the logical meaning of 'pollutant' did not include indoor pollutants).

69. See generally Catalano, *supra* note 1 (compiling cases concerning pollution exclusions).

70. 598 F.3d 918 (7th Cir. 2010).

71. *Id.* at 919.

72. *Id.*

73. *Id.*

general liability policies with a succession of different insurance companies, which eventually led to the dispute between insurers.<sup>74</sup>

A class action suit was brought by a number of area residents.<sup>75</sup> They alleged both property damage and bodily injury as a result of the release of gasoline into the area's groundwater.<sup>76</sup> West Bend paid out \$4,000,000 to settle the case.<sup>77</sup> For its part, Federated refused to either defend or indemnify the insured,<sup>78</sup> and West Bend filed suit against Federated in order to recoup at least a portion of the settlement expense.<sup>79</sup>

To the presumable chagrin of West Bend, but in compliance with the well-reasoned majority rule,<sup>80</sup> the Seventh Circuit Court of Appeals found that the absolute pollution exclusion in the Federated policy barred coverage for harms caused by gasoline.<sup>81</sup> Just as in Minnesota cases,<sup>82</sup> the policy was analyzed as a whole rather than in parts, and words were taken to have their "ordinary meaning."<sup>83</sup> The court neither required nor expected that the insured be fluent in the technical language employed by the insurer-drafter in order to understand the policy.<sup>84</sup> In a similar spirit, the court noted that under the standard employed, any ambiguity found within the policy terms would be strictly interpreted against the insurer.<sup>85</sup>

The policy at issue was held to be unambiguous under the facts of the case.<sup>86</sup> It explicitly barred coverage for harms caused by gasoline.<sup>87</sup> The policy also defined "pollutant" broadly as "any solid,

74. *Id.* at 919–20.

75. *Id.* at 920.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *See id.* at 923–24. Although the court did not explicitly refer to the "majority rule," it interpreted the pollution exclusion narrowly and found the policy to be "sufficiently explicit" for the insured to be aware that damage caused by gasoline leakage would not be covered. *Id.*

81. *Id.* at 919.

82. *See supra* Part II.C.

83. *West Bend Mut. Ins. Co.*, 598 F.3d at 921 (applying Indiana law).

84. *See id.*

85. *Id.*

86. *Id.* at 922.

87. The terms of the policy stated as follows:

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release

liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.”<sup>88</sup> As will be shown, the language in this policy was quite similar to the language at issue in *Wolters*.<sup>89</sup> But, given the nature of both the substance and the harm, it was proper in this instance for the court to hold that coverage was barred.

The fact that the pollutant was released directly into the ground, rather than into the interior of a structure,<sup>90</sup> only strengthens the applicability of the exclusion in this case. The damage was widespread: the pollutant went well beyond the boundaries of the insured property and caused property damage and bodily injury to families outside of the policy coverage.<sup>91</sup> Although not discussed by the court, it is also relevant that the

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or escape of “pollutants”:

...

(f) At or from any tank, piping, pumps or dispensers at premises, sites or locations in addition to those described in subparagraphs (a), (b), (d) or (e), which are or were at any time owned, leased, installed, removed, tested, repaired or filled by or on behalf of any insured, wherever located (except at residences primarily used for dwelling purposes) which contain, transport or dispense or are designed to contain, transport or dispense:

(i) motor fuels;

(ii) kerosene;

(iii) lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of any “auto,” “mobile equipment,” watercraft or aircraft; or

(iv) waste lubricants or other operating fluids which are or were needed to perform the normal, electrical, hydraulic or mechanical functions necessary for the operation of any “auto,” “mobile equipment,” watercraft or aircraft;

including, but not limited to, their constituent parts and other irritants or contaminants found therein. . . .

Motor fuels means petroleum or a petroleum-based substance that is typically used in the operation of a motor or engine, including but not limited to gasoline, aviation fuel, number one or number two diesel fuel, or any grade of gasohol.

*Id.* at 920–21.

88. *Id.* at 921.

89. *See infra* Part III.C.

90. *See West Bend*, 598 F.3d at 920.

91. *Id.*

damage took several years to accrue.<sup>92</sup> This further serves to bring gasoline within the realm of a traditional environmental pollutant,<sup>93</sup> as any individual minimally versed in environmental matters knows that such harms do not often occur quickly.<sup>94</sup>

In another case from the Seventh Circuit, *Scottsdale Indemnity Co. v. Village of Crestwood*,<sup>95</sup> the court once again held the harm at issue to be barred from coverage by the pollution exclusion.<sup>96</sup> Similar to the facts in *West Bend*,<sup>97</sup> the village government knew that the well water being consumed by residents contained contaminants, and the harms caused by these contaminants accrued over the course of multiple years.<sup>98</sup> The court's rationale largely mimicked that employed in *West Bend*,<sup>99</sup> but the case is particularly notable in that Judge Richard Posner explicitly addressed the overly broad definition of "pollutant" inherent in the minority interpretation of absolute pollution exclusions.<sup>100</sup>

Judge Posner noted,

There is no doubt that perc is a "contaminant" within the meaning of the policies; and the tort plaintiffs are

92. *Id.* at 919–20.

93. *See id.*

94. Notable exceptions to this general rule include environmental disasters such as the Deepwater Horizon spill in the Gulf of Mexico, which happened quite quickly. Such instances, however, are precisely the reason that insurers shifted from the "sudden and accidental" pollution exclusions to "absolute" pollution exclusions. *See generally supra* Part II.A (examining the development of pollution exclusions since the 1970s). Holding that "absolute" pollution exclusions bar coverage for damage that accrues over an extended period of time (as opposed to the court's "plain-meaning" approach in *Wolters*) would generally do justice to the intent of the insurer while still paying heed to the standard of the reasonable insured. *See infra* Part IV.B–C. There is substantial authority that would allow a rational and well-founded exception to the standard supported by this note so as to bar coverage for such incidences as the Deepwater Horizon explosion. Bick & Youngblood, *supra* note 3; *see infra* Part IV.C (advancing Judge Posner's proposed standard of "pollution harms as ordinarily understood").

95. 673 F.3d 715 (7th Cir. 2012). The facts of this case were particularly fitting to the application of the pollution exclusion: the Village of Crestwood not only continued using the well water for decades after discovery of the pollutant, but village officials also failed to comply with promises made to Illinois officials that the well would be used only in cases of emergency. *Id.* at 716.

96. *Id.* at 721 (applying Illinois law).

97. 598 F.3d at 919–21.

98. *Crestwood*, 673 F.3d at 716.

99. 598 F.3d at 921–26.

100. *Crestwood*, 673 F.3d at 716–19.

complaining about its “dispersal” by the Village from the contaminated well to their homes via the system of water mains that connects the well to the homes. The problem with stopping there and affirming the district court in one sentence is that *a literal reading of the pollution exclusion would exclude coverage for acts remote from the ordinary understanding of pollution harms and unrelated to the concerns that gave rise to the exclusion.*<sup>101</sup>

The two foregoing sentences succinctly illustrate the flaw in the minority view.<sup>102</sup> Applying the pollution exclusion to certain events is, in no way, giving words their plain and ordinary meaning.<sup>103</sup>

### III. MIDWEST FAMILY MUTUAL INSURANCE COMPANY V. WOLTERS

#### A. Factual Background

In 2007, appellant Charles E. Bartz decided to do a quintessentially Minnesotan thing: build a secluded cabin in the woods.<sup>104</sup> In pursuance of this dream, he hired respondent Michael D. Wolters to act as general contractor for the cabin’s construction.<sup>105</sup>

One of the specifications for Mr. Bartz’s cabin was that the furnace be equipped to accept propane fuel.<sup>106</sup> Mr. Wolters maintained that he instructed his heating subcontractor of this necessity, but it is clear that Mr. Wolters himself ultimately installed a furnace equipped solely for natural gas.<sup>107</sup> If this had been noticed, it would not have been an insurmountable mistake. The problem could have been fixed by installing a different size burner in the same furnace.<sup>108</sup> Nonetheless, whether he was aware of the

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101. *Id.* at 716–17 (emphasis added).

102. *See id.*; *see also infra* Part IV.

103. *See infra* Part IV.

104. *Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 631 (Minn. 2013).

105. *Id.*

106. *Id.*

107. *Id.*

108. *See* Appellants’ Reply Brief at 1, *Wolters*, 831 N.W.2d 628 (No. A11-181), 2012 WL 10206155, at \*1 (“There is something inherently wrong with denying liability coverage to an insured homebuilder under a pollution exclusion, when the builder merely forgot to plug-in the carbon monoxide detector and failed to



furnace's configuration or not, Mr. Wolters personally connected the natural gas furnace to a propane fuel source.<sup>109</sup> Additionally, the carbon monoxide detectors in the home were not connected to the AC power source and contained batteries that had been installed backwards.<sup>110</sup> This was the state of affairs when Mr. Bartz brought his friend Catherine M. Brewster for a visit.

In the early morning hours of December 29, 2007, Ms. Brewster awoke to find Mr. Bartz unresponsive.<sup>111</sup> Feeling dizzy and nauseous, she attempted to get fresh air into the house by opening a back door, but hit her head on the sliding glass door.<sup>112</sup> She fell to the ground with a deep cut on her face.<sup>113</sup> Eventually she managed to get to the kitchen, where she found a phone and dialed 911.<sup>114</sup> Thankfully, emergency crews arrived in time to assist both Ms. Brewster and Mr. Bartz.<sup>115</sup> The two survived their bouts of carbon monoxide poisoning and filed suit against Mr. Wolters for negligence.<sup>116</sup>

### *B. Procedural Background*

Mr. Wolters invoked his insurance policy from Midwest Family Mutual Insurance Company (Midwest),<sup>117</sup> no doubt reasoning that these circumstances are exactly why contractors purchase liability insurance. Midwest sought a declaratory judgment that the policy's "absolute pollution exclusion" barred coverage under these circumstances.<sup>118</sup> The district court denied the motion and ultimately "entered final judgment against Midwest," holding "that Midwest had a duty to defend or indemnify [Mr.] Wolters" under the policy.<sup>119</sup>

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exchange a large burner orifice in the radiant heat boiler with a smaller one.").

109. *Wolters*, 831 N.W.2d at 631.

110. *Id.* Mr. Wolters testified that he had personally tested the detectors after instructing an electrical subcontractor to install them. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 632.

117. *See id.*

118. *Id.*

119. *Id.* When Midwest moved for summary judgment earlier in the case, "[t]he district court denied Midwest's motion, holding that it would be 'inappropriate to rule as a matter of law' that the 'absolute pollution exclusion

On appeal, the Minnesota Court of Appeals reversed,<sup>120</sup> holding that under the “non-technical, plain-meaning approach” used in Minnesota to interpret pollution exclusions, “carbon monoxide constitutes a pollutant.”<sup>121</sup> Mr. Wolters appealed the decision and the Minnesota Supreme Court affirmed.<sup>122</sup>

At this juncture, the cases involving Mr. Bartz and Ms. Brewster were still ongoing.<sup>123</sup> Mr. Wolters had the unfortunate experience of being mired in several different lawsuits at once;<sup>124</sup> one of these lawsuits was against a company with assumedly disproportionate resources to his own.<sup>125</sup> It takes no stretch of the imagination to envision how quickly Mr. Wolters’s profits from the construction of the Bartz cabin would have dissipated in the face of this extensive litigation.

Although no more relevant to this Note’s analysis than it was to the court’s ruling, it must be acknowledged that, from a practical standpoint, it may not be such a travesty if Mr. Wolters’s company has since gone out of business. According to court records, there have been claims filed against his company on a number of occasions.<sup>126</sup> Each of these claims, including those of Mr. Bartz and Ms. Brewster, eventually settled without trial.<sup>127</sup> Furthermore, the repeated claims may partly explain why it is that Midwest invested so many resources in litigating against its own insured. The unfortunate result, however, is that having now won such a battle,

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bars coverage under the facts in this case,’ since [Mr.] Wolters did not ‘cause any environmental pollution.’” *Id.* (quoting the district court).

120. *Midwest Family Mut. Ins. Co. v. Wolters*, No. A11-181, 2011 WL 3654498, at \*1 (Minn. Ct. App. Aug. 22, 2011).

121. *Id.* at \*3 (quoting *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777, 779 (Minn. Ct. App. 1999)).

122. *Wolters*, 831 N.W.2d at 639; *see infra* Part III.C.

123. *See Brewster v. Wolters*, No. 04-CV-10-2492 (Minn. Dist. Ct. Aug. 5, 2013) (notice of filing of order and entry of judgment); *Bartz v. Wolters*, No. 04-CV-11-375 (Minn. Dist. Ct. Aug. 5, 2013) (notice of filing of order and entry of judgment).

124. *See Wolters*, 831 N.W.2d 628; cases cited *infra* note 126.

125. Ron Boyd, *MFM Announces 2011 Results and Plans for 2012*, MIDWEST FAMILY MUT. INS. CO. (Feb. 11, 2012, 1:02 PM), <https://midwestfamily.com/news.php?detail=589> (indicating that the company exceeded \$100 million in invested assets in 2011).

126. *See, e.g., Melchert v. Wolters*, No. 66-S9-02-000389 (Minn. Dist. Ct. Jan. 2, 2003) (converted disposition, settled); *Bardal v. Precision Builders*, No. 66-CX-98-000458 (Minn. Dist. Ct. July 10, 1998) (converted disposition, closed).

127. *See, e.g.,* cases cited *supra* note 126.

Midwest and every other Minnesota insurer have a valid reason to believe that the absolute pollution exclusion may be successfully invoked when actuary science fails to protect the bottom line.

### C. *The Court's Analysis and Holding*

Affirming the court of appeals, the Minnesota Supreme Court held that “carbon monoxide released from a negligently installed boiler is a ‘pollutant’ that is subject to the absolute pollution exclusion of the [general liability insurance] policy” at issue.<sup>128</sup> Despite extensive case law that advances a contrary view,<sup>129</sup> the court claimed that this is the *only* logical conclusion to be reached under the standard rules of contract interpretation.<sup>130</sup>

The rules that the court purported to apply are a direct replication of those applied by the Seventh Circuit Court of Appeals, thus buttressing the contention that they are indeed “standard.” Here, however, the court reached an entirely different result than that which would be reached in the majority of this nation’s jurisdictions applying those same rules.<sup>131</sup> The rules, as presented by the Minnesota Supreme Court, are as follows: Insurance contracts are “to be interpreted according to both ‘plain, ordinary sense’ and ‘what a reasonable person in the position of the insured would have understood the words to mean.’”<sup>132</sup> The intent of both parties is to be paid heed to, and the policy must be interpreted as a whole rather than part-by-part.<sup>133</sup> Finally, any ambiguities, denoted by the possibility of two or more reasonable interpretations,<sup>134</sup> are to be “resolved in favor of the insured.”<sup>135</sup>

The Midwest policy defined “pollutant” as “any solid, liquid, gaseous, thermal, electrical emission (visible or invisible) or sound

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128. *Wolters*, 831 N.W.2d at 638.

129. *See* cases cited *supra* note 38.

130. *Wolters*, 831 N.W.2d at 636.

131. *See supra* Part II.D.

132. *Wolters*, 831 N.W.2d at 636 (quoting *Canadian Universal Ins. Co. v. Fire Watch, Inc.*, 258 N.W.2d 570, 572 (Minn. 1977)) (citing *Farmers Home Mut. Ins. Co. v. Lill*, 332 N.W.2d 635, 637 (Minn. 1983)).

133. *Id.*

134. *Id.* (citing *Medica, Inc. v. Atl. Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997)).

135. *Id.* (quoting *Prahm v. Rupp Constr. Co.*, 277 N.W.2d 389, 390 (Minn. 1979)).

emission pollutant, irritant or contaminant.”<sup>136</sup> As the court noted, the dictionary defines carbon monoxide as “a colorless odorless very toxic gas,”<sup>137</sup> and it most certainly caused irritation to Ms. Brewster and Mr. Bartz.<sup>138</sup> Therefore, carbon monoxide is a gaseous substance that causes irritation, and accordingly, the substance is a pollutant as defined by the policy.<sup>139</sup>

As to the contention that it is ambiguous whether the policy applies to indoor pollution as well as outdoor pollution, the court turned to precedent.<sup>140</sup> The Midwest policy contained neither the word “atmosphere” nor the word “air,”<sup>141</sup> and was therefore found to be unambiguous and deserving the broadest possible interpretation<sup>142</sup> —or at least, the broadest interpretation yet applied in Minnesota.<sup>143</sup>

In addition to holding that recovery for damages caused by the indoor release of carbon monoxide due to a negligently installed boiler is barred by the pollution exclusion, the court also considered the “reasonable expectations” doctrine.<sup>144</sup> This doctrine instructs that where an exclusion is not easily recognizable as a limit on coverage, “the insured should be held only to reasonable knowledge of the literal terms and conditions.”<sup>145</sup> Having found this doctrine to be inapplicable to the Midwest policy,<sup>146</sup> the court ruled in favor of Midwest.<sup>147</sup>

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136. *Id.* at 641. Note that this definition is substantially similar to that at issue in *West Bend Mut. Ins. Co. v. U.S. Fid. & Guar. Co.*, 598 F.3d 918, 921–22, 925 (7th Cir. 2010), discussed *supra* Part II.D.

137. *Wollers*, 831 N.W.2d at 637 (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 171 (10th ed. 2001)).

138. *Id.*

139. *Id.*

140. *Id.* at 638 (citing *Bd. of Regents v. Royal Ins. Co. of Am.*, 517 N.W.2d 888, 891–93 (Minn. 1994)).

141. *Id.* at 631–32.

142. *Id.* at 636–37; *see also* *Medica, Inc. v. Atl. Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997). The court’s finding in *Wollers* illustrates the incentive that insurers have to encourage expansion of pollution exclusions, whether such encouragement comes in the form of further litigation or minor policy-language changes which only the most aware of the insured would notice. 831 N.W.2d at 636–37.

143. *See supra* Part II.C.

144. *Wollers*, 831 N.W.2d at 638–39.

145. *Atwater Creamery Co. v. W. Nat’l Mut. Ins. Co.*, 366 N.W.2d 271, 278 (Minn. 1985).

146. The “reasonable expectations” doctrine is distinct from the “reasonable

## IV. THE PROBLEMATIC NATURE OF THE COURT'S HOLDING

This Note is concerned with three issues arising from the *Wolters* decision. Although the issues will be addressed separately, each is intertwined with the others in the sense that they will present sometimes insurmountable obstacles to the continuance of certain businesses.

The first issue involves an area of law that has seen a great deal of litigation and a distinct jurisdictional split<sup>148</sup>: the *Wolters* court determined that there was no ambiguity in the absolute pollution exclusion.<sup>149</sup> As the dissent noted, this finding is difficult to rationalize.<sup>150</sup>

The second issue is that the court has allowed pollution exclusions to expand far beyond their original purpose.<sup>151</sup> Perhaps some expansion was in order given the modified language of the exclusions,<sup>152</sup> but the extent to which *Wolters* expanded it will undoubtedly result in even more litigation. This will almost certainly be litigation that mires insured businesses in multiple lawsuits at a time, including legal disputes with their own insurers.<sup>153</sup>

The third issue is that *Wolters* contradicted the longstanding notion that insurance contracts are to be interpreted "according to what a reasonable person in the position of the insured would have

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insured standard." The former pertains primarily to instances in which the insured could not be reasonably expected to even know of the policy term in question, rather than when an exclusion is clearly marked as it was in *Wolters*. 831 N.W.2d at 634. The latter pertains to all insurance contracts, in that they are to be interpreted in light of what a reasonable person in the position of the insured would take the policy to mean. *Id.* at 642 n.2 (Paul Anderson, J., dissenting).

147. *Id.* at 639 (majority opinion).

148. Catalano, *supra* note 1; *see supra* Part III.A–B.

149. 831 N.W.2d at 638.

150. *Id.* at 642–43 (Paul Anderson, J., dissenting) ("I find it difficult to understand how the majority can conclude that the policy is unambiguous on the facts of this case.").

151. As demonstrated by *Board of Regents v. Royal Insurance Co. of America*, in which two different policies were at issue, the insurance industry has made minor changes to the wording of the pollution exclusions over the years. 517 N.W.2d 888 (Minn. 1994). This change of wording is assumed to be purposeful, but it is not certain that it was meant to preclude coverage of all incidents involving substances within the policy definition of "pollutants" when released indoors. *Id.*

152. *Id.*

153. *See, e.g.*, cases cited *supra* note 123.

understood the words to mean.”<sup>154</sup> This error exacerbates the inherent disparities in bargaining power between insurers and their customers, thus rendering the relationships more inequitable.

#### A. *Ambiguity of the Absolute Pollution Exclusion*

In contract law, a term is ambiguous “if it is susceptible to two or more reasonable interpretations.”<sup>155</sup> As previously discussed, pollution exclusions have been the subject of an inordinate number of cases.<sup>156</sup> Different jurisdictions have decided the question of ambiguity in different ways, with the majority finding more than one reasonable interpretation of the word “pollutant.”<sup>157</sup>

Given the split of authority on this matter, inherent in the court’s finding that no ambiguity exists is the proposition that a majority of the courts in the country have adopted an unreasonable interpretation.<sup>158</sup> When judges, who are trained in the interpretation of language, can come to differing conclusions as to the meaning of a term or word, it seems evident that such a term or word should be deemed ambiguous. If both the Minnesota Supreme Court’s interpretation and, for example, the Illinois Supreme Court’s interpretation are reasonable, then ambiguity should be found.<sup>159</sup> Indeed, the Minnesota Supreme Court has noted precisely that in previous cases.<sup>160</sup>

Furthermore, the pollution exclusion involved in *Wolters* is facially ambiguous. It defines pollutant as “any solid, liquid, gaseous, thermal, electrical emission (visible or invisible) or sound emission pollutant, irritant or contaminant.”<sup>161</sup> Is this to suggest that irritation or contamination caused by any matter—whatever its

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154. Canadian Universal Ins. Co. v. Fire Watch, Inc., 258 N.W.2d 570, 572 (Minn. 1977) (citing *Petronzio v. Brayda*, 350 A.2d 256, 261 (N.J. 1975)).

155. *Wolters*, 831 N.W.2d at 636.

156. See Catalano, *supra* note 1, § 2.

157. See *id. passim*; see also *Wolters*, 831 N.W.2d at 635.

158. See *Wolters*, 831 N.W.2d at 642 (Paul Anderson, J., dissenting).

159. Compare *Am. States Ins. Co. v. Koloms*, 687 N.E.2d 72, 73 (Ill. 1997) (holding that carbon monoxide was not subject to the pollutant exclusion), with *Wolters*, 831 N.W.2d at 637 (majority opinion) (holding that carbon monoxide was subject to the pollutant exclusion).

160. See, e.g., *Wolters*, 831 N.W.2d at 643 (Paul Anderson, J. dissenting) (citing *Minn. Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 180 (Minn. 1990) (noting that an inherent ambiguity is present when there is “sharp division” of interpretations in other jurisdictions)).

161. *Id.* at 632 (majority opinion).

form—falls within the exclusion? Such an interpretation, although certainly reasonable under the plain-meaning approach, has the potential effect of negating coverage for virtually all activities that take place on a construction site.<sup>162</sup> Given that the primary incentive for contractors to purchase commercial general liability policies is to protect themselves from the financial harms of making a mistake, the broad interpretation employed by the majority renders the policies largely useless. Such a result suggests ambiguity.<sup>163</sup>

The Minnesota Supreme Court has erred by holding that there is no ambiguity in a clause that has resulted in extensive litigation and a jurisdictional split.<sup>164</sup> This holding suggests that the majority of courts in this nation are inherently unreasonable.<sup>165</sup> Furthermore, the logical ramification of *Wolters* may be to bar coverage in circumstances where different parts of the policy suggest otherwise.<sup>166</sup> Under the rules of interpretation that the court purported to use,<sup>167</sup> this also supports a finding of ambiguity.

#### B. *Undue Expansion of the Absolute Pollution Exclusion*

The purpose of a pollution exclusion is to bar insurance coverage for traditional environmental pollution.<sup>168</sup> First in *Board of Regents*,<sup>169</sup> and now to a greater extent in *Wolters*,<sup>170</sup> the court has eliminated this purpose.<sup>171</sup> Of course, some expansion of the exclusion may be in order. The language of the standard absolute pollution exclusion has changed over the years.<sup>172</sup> This reflects

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162. *Scottsdale Indem. Co. v. Vill. of Crestwood*, 673 F.3d 715, 716–17 (7th Cir. 2012) (“[T]he problem . . . is that a literal reading of the pollution exclusion would exclude coverage for acts remote from the ordinary understanding of pollution harms and unrelated to the concerns that gave rise to the exclusion.”).

163. 22 WEIMER ET AL., *supra* note 17, § 2:3 (explaining that “courts are reluctant” to adopt an interpretation “that would forfeit expected policy benefits”).

164. *Wolters*, 831 N.W.2d at 639.

165. *See id.* at 643 (Paul Anderson, J., dissenting).

166. *See infra* Part IV.B.

167. *Wolters*, 831 N.W.2d at 636.

168. *See Bick & Youngblood*, *supra* note 3, at 126–29 (discussing cases that distinguish man-made pollution from natural environment pollution).

169. *Bd. of Regents v. Royal Ins. Co. of Am.*, 517 N.W.2d 888 (Minn. 1994).

170. 831 N.W.2d at 639.

171. *Id.*

172. *See Bd. of Regents*, 517 N.W.2d 888; *see also Bick & Youngblood*, *supra* note

intent on the part of insurers to change the reach of the exclusion.<sup>173</sup> However, the extent of the interpretive latitude now granted is uncalled for. It raises countless questions, and will undoubtedly result in even more litigation.

Consider an example likely to arise in Minnesota: water damage caused by ice dam removal.<sup>174</sup> The removal of ice dams often involves the use of hot water emitted from a pressure sprayer onto the roof of a building. Occasionally, the combination of hot water, high pressure, frigid temperatures, and an already-leaking roof results in water damage to the interior of the building.

A responsible contractor engaged in such work would hold a commercial general liability policy to protect herself and her customers from potential damage. Yet, water is plainly a “liquid,” and in this example, it has plainly been subject to “discharge” in connection with the contractor’s work.<sup>175</sup> Thus, interior water damage caused by ice dam removal arguably fits into the “non-technical, plain-meaning” of the absolute pollution exclusion.<sup>176</sup> On the other hand, the risk of precisely this type of damage may be the principal reason for the insured to buy the policy. Thus, if the pollution exclusion does apply to such damage, the policy may be illusory.<sup>177</sup> The potential resulting litigation is the sort that ruins small businesses in a matter of weeks. To start, the owner of the damaged property sues the service-providing company.<sup>178</sup> The contractor then turns the suit over to her insurance company, expecting that her liability policy will require the insurer to defend and indemnify her.<sup>179</sup> In an unexpected twist, the insurer then files suit against the contractor in order to determine liability.<sup>180</sup>

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3, at 123–25.

173. See generally Bick & Youngblood, *supra* note 3 (discussing the changes in language within pollution exclusions and potential reasons for them).

174. The author worked for a Minnesota construction company specializing in seamless gutters and ice dam removal for eight years. All comments on the ice dam removal process stem from this experience.

175. Wolters, 831 N.W.2d at 631–32.

176. *Id.* at 633–34.

177. 22 WEIMER ET AL., *supra* note 17, § 2:5 (explaining that “insurance contracts are construed so as not to be a delusion to the insured”).

178. See generally Wolters, 831 N.W.2d at 632 (discussing the litigation of the parties).

179. See 22 WEIMER ET AL., *supra* note 17, § 3.2 (discussing indemnification and expectations).

180. See Wolters, 831 N.W.2d at 632.



This may happen no matter what the insurer originally intended the absolute pollution exclusion to mean. To the insurer, winning one suit inures potential savings in the hundreds of thousands or perhaps even millions of dollars. These are not savings that result from sound business planning and ingenuity; these are savings that result from the inherent disparities in bargaining power and legal funds between the insurer and the insured. The Minnesota Supreme Court now gives the insurer sound reason to hope those disparities will broaden even further.<sup>181</sup>

To the contractor, fighting such a suit against her well-heeled insurer may lead to speedy bankruptcy. Even if the insured prevails, she has now been forced to cover the extensive costs of litigation. In addition, she has had to substitute revenue-generating time on rooftops for time spent in courtrooms and law offices. Perhaps she may recoup these expenses when the appeals process has finally been exhausted, but she will never regain the lost customers. She will also return to work, assuming she still owns the pressure sprayer and has been able to retain her employees, with newly acquired fears about the risks of doing her job well. She is already trudging around on icy rooftops; must she also fear being mired in another needless lawsuit?

### C. *A Suggested Alternative*

The *Wolters* court, in a counterintuitive move,<sup>182</sup> noted that, “Appellants do not propose a definition of ‘traditional environmental pollution’ except to assure our court that such a phrase would not include carbon monoxide.”<sup>183</sup> Given the substantial consideration allotted to this issue by other jurisdictions,<sup>184</sup> the fact that these particular litigants had not

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181. See *id.* at 638–39.

182. See *Midwest Family Mut. Ins. Co. v. Wolters*, No. A11-181, 2011 WL 3654498, at \*3 (Minn. Ct. App. Aug. 22, 2011), *aff’d*, 831 N.W.2d 628 (“The district court concluded that the absolute pollution exclusion should be limited to traditional environmental pollutants, reasoning that Minnesota courts’ past interpretations of the exclusion to include interior contamination from ordinary negligence is against public policy. Although the concerns expressed by respondents and the district court appear valid, precedent compels an interpretation of the pollution exclusion to include interior pollutants, and any policy-based expansion of that exclusion is beyond our authority.”).

183. *Wolters*, 831 N.W.2d at 638.

184. See generally Catalano, *supra* note 1 (providing a comprehensive list of the

advanced a new definition to account for the modified policy language lends little credence to the court's decision to stick with the old definition.

Judge Richard Posner, writing for the Seventh Circuit Court of Appeals, has considered the difficulty of syncing "traditional environmental pollution" with the modified policy language.<sup>185</sup> He suggests that this is not necessary, and advances an entirely new definition: "[P]ollution harms as ordinarily understood."<sup>186</sup> This definition would "exclude the case of the leaking furnace."<sup>187</sup> Few laypeople would ever consider an event that requires little more of a solution than opening the windows to be a harm caused by pollution.<sup>188</sup> Judge Posner's definition would also exclude the case of water damage caused by ice dam removal. After all, under what ordinary understanding would water, especially when serving a useful purpose, constitute a "pollutant?"<sup>189</sup>

While barring application of the exclusion to cases such as negligently installed furnaces and water damage, the "pollution harms as ordinarily understood" definition also accounts for the obvious intent of the insurance industry to not be strictly held to the traditional environmental pollution standard.<sup>190</sup> As previously discussed, courts have distinguished policies that limit the exclusion to pollution of "the atmosphere" and those that apply to pollution of the "air" or contain no such language.<sup>191</sup> It is assumed that insurers did not modify the policy language without reason, but it is far from clear that the drafters of the new language, not to

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many cases involving pollution exclusions).

185. *Scottsdale Indem. Co. v. Vill. of Crestwood*, 673 F.3d 715, 717 (7th Cir. 2012).

186. *Id.*

187. *Id.*

188. See Appellants' Reply Brief, *supra* note 108, at 1; *In an Emergency*, CO BE ALARMED, <http://www.co-bealarmed.co.uk/in-an-emergency/> (last visited Apr. 23, 2015).

189. This example is analogous to one advanced by Judge Posner, namely, "If one commits suicide by breathing in exhaust fumes, is that death by pollution?" *Crestwood*, 673 F.3d at 717. Of course, a difference that cannot be ignored is that "suicide by breathing in exhaust fumes," *id.*, is hardly a useful purpose, whereas hot water used to remove ice dams very much is.

190. See *id.*

191. See *Bd. of Regents v. Royal Ins. Co. of Am.*, 517 N.W.2d 888 (Minn. 1994); see also *Bick & Youngblood*, *supra* note 3, at 123–25.

mention the individuals who buy the policies, intended such a broad exclusion as that found in *Wolters*.<sup>192</sup>

Perhaps the largest advantage of Judge Posner's proposed definition<sup>193</sup> is that it allows for development to occur naturally with the passage of time, as all sound legal standards should. As science develops and popular understandings change, courts would be able to respond without overturning precedent and reinventing the wheel. It is time that the Minnesota Supreme Court paid heed to the many courts and scholars who have considered this area of law,<sup>194</sup> and reached a more appropriate conclusion than that of *Wolters*.<sup>195</sup>

#### *D. Abandoning the Standard of the Reasonable Insured*

It is a long-standing tenet of Minnesota insurance litigation that policies and, by extension, policy exclusions, are to be interpreted in light of "what a reasonable person in the position of the insured would have understood the [policy] to mean."<sup>196</sup> In *Wolters*, the court noted that the insured argued for basing the decision off of this tenet, acknowledged the argument's validity,<sup>197</sup> and then, as the dissent pointed out,<sup>198</sup> entirely ignored it.<sup>199</sup>

By ignoring the "reasonable insured" standard,<sup>200</sup> the court implicitly held that a reasonable person in *Wolters's* position would

192. *Wolters*, 831 N.W.2d at 636 ("Midwest argues that under the plain-meaning approach to interpreting policy language as set forth in our *Board of Regents* decision, carbon monoxide is clearly a pollutant to which the absolute pollution exclusion applies."). Certainly, attorneys for Midwest argued for the broad interpretation. *Id.* This does not mean that the drafters necessarily intended it, and it definitely does not mean that the insured should have anticipated the application of the exclusion in such a counterintuitive manner. See *Crestwood*, 673 F.3d at 717; *Wolters*, 831 N.W.2d at 638.

193. See *Crestwood*, 673 F.3d at 717.

194. See, e.g., *Crestwood*, 673 F.3d 715 *passim*; Stempel, *supra* note 22, at 58–59.

195. *Wolters*, 831 N.W.2d 628.

196. See, e.g., *Farmers Home Mut. Ins. Co. v. Lill*, 332 N.W.2d 635, 637 (Minn. 1983) (quoting *Canadian Universal Ins. Co. v. Fire Watch, Inc.*, 258 N.W.2d 570, 572 (Minn. 1977)).

197. 831 N.W.2d at 633–34.

198. *Id.* at 641 (Paul Anderson, J., dissenting).

199. *Id.* at 634–36 (majority opinion). The court also noted that the "reasonable insured" standard is distinct from the "reasonable expectations" doctrine, but only considered the latter in its analysis. See *id.*

200. See generally *Wolters*, 831 N.W.2d 628.

not expect to be covered for the negligent installation of a furnace and carbon monoxide detectors.<sup>201</sup> If that is the court's holding, the standard may just as well have been abandoned.

Few contractors are trained in the complexities of contract interpretation and may not be aware of the broad meanings courts sometimes attach to common terms.<sup>202</sup> Pollution suggests long-lasting damage and solutions which take a relatively substantial amount of time to enact, even if such damage occurs indoors.<sup>203</sup> Mitigating carbon monoxide discharge requires only that the windows be opened and that the wrongly installed furnace be fixed.<sup>204</sup> A reasonable contractor, even one who made note of the broad policy definition of "pollutant,"<sup>205</sup> could hardly be expected to foresee the application of the exclusion to such a situation. Thus, coverage should be found.<sup>206</sup>

To ignore the reasonable insured standard is to ignore one of the most basic tenets of insurance contract interpretation.<sup>207</sup> Moreover, disregarding this standard exacerbates the disparities in bargaining power inherent in such contracts and puts insurers in a position to blindside those who have done the right thing in securing a policy.

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201. See *id.* at 638–39.

202. See, e.g., Bick & Youngblood, *supra* note 3, at 120–21.

203. See, e.g., Scottsdale Indem. Co. v. Vill. of Crestwood, 673 F.3d 715, 717 (7th Cir. 2012) (noting that in other cases involving pollution exclusion clauses, coverage was denied when the harms occurred over a period of years, whereas coverage was found when the harms could be resolved in a relatively short period of time); Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1043 (7th Cir. 1992) (employing several examples of harms caused by substances which fit the policy definition of "pollutant," but finding that coverage would exist in instances where the harm caused by the substances occurred quickly and unexpectedly).

204. See generally *Wolters*, 831 N.W.2d 628; see also *In an Emergency*, *supra* note 188.

205. See *supra* text accompanying notes 196 and 197.

206. See, e.g., Bick & Youngblood, *supra* note 3, at 133–36 (arguing and providing support for the proposition that coverage for indoor pollution is not excluded by the absolute pollution exclusion clause).

207. See *Wolters*, 831 N.W.2d at 636.

## V. CONCLUSION

In the same breath that the court recognized that “there are serious concerns associated with the breadth of the exclusion,”<sup>208</sup> it handed down a ruling<sup>209</sup> that raises concerns both rational and substantial. Holding that there is no ambiguity in a type of contract that has instigated an inordinate amount of litigation,<sup>210</sup> the court disagreed with the majority of jurisdictions<sup>211</sup> and made a ruling that will result in even more disputes. The expansion of the pollution exclusion, based in part on the finding of no ambiguity,<sup>212</sup> will likewise result in even more litigation. Furthermore, such expansion will be detrimental to policyholders, while benefitting insurers. Policyholders will continue to be surprised that their coverage is not as expansive as they thought, and insurers will continue to reap the financial rewards of selling the policies while not satisfying claims for any careless act which happens to involve a “pollutant.” Finally, when the court ignored the “reasonable insured” standard,<sup>213</sup> it cast aside a basic principle of contract law.<sup>214</sup> This should not have been done, and it will, along with the expansion of the exclusion, benefit the party with already greater bargaining power. The court, in one of the inevitable subsequent cases, needs to reconsider the holding of *Wolters*.

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208. *Id.* at 637 (“It is enough for purposes of the present dispute to conclude that carbon monoxide is a pollutant under the terms of the absolute pollution exclusion; there are serious concerns associated with the breadth of the exclusion that we leave for another day, and we do not attempt to define the complete scope of the term ‘pollutant’ in the absolute pollution exclusion. Instead, we only conclude that, based on our holding in *Board of Regents*, carbon monoxide qualifies as a pollutant in this case.”).

209. *Id.* at 639.

210. *See Catalano, supra* note 1.

211. *Wolters*, 831 N.W.2d at 635.

212. *See id.* at 639.

213. *See id.* at 638.

214. *See id.* at 636.